

2.1 Memorandum of the Risk Management Fund Liability and Defense Coverage

The 1995 North Dakota Legislature created a new chapter of the Century Code, N.D.C.C. ch. 32-12.2, governing claims against the State and State employees for personal injury, death, or property damage caused by the State or a State employee “acting within the scope of the employee’s employment.”

The chapter also established the Risk Management Fund and directed that it be administered by the Office of Management and Budget.

This memorandum is a summary of the Risk Management Fund program created by the law and is not intended to create any rights or responsibilities other than those established in N.D.C.C. ch. 32-12.2.

Provisions of the Risk Management Fund

Damages Coverage

The Risk Management Fund will pay money damages for an injury caused by the negligence or wrongful act or omission of a State employee acting within the employee’s scope of employment which the employee would be personally liable to pay a claimant under state law.

The Risk Management Fund also will pay money damages for an injury caused from some condition or use of tangible property under circumstances in which the State, if it were a private person, would be liable to the claimant.

Coverage includes claims for damages resulting from an occurrence, accident, wrongful act, error or omission or claim made because of bodily injury, personal injury, property damage, professional liability, or public officials’ professional liability or any combination thereof.

However, the Risk Management Fund will not pay money damages for those claims excluded under N.D.C.C. ch. 32-12.2 or other applicable law.

Coverage Limit

The amount of money damages the Risk Management Fund may pay is limited to a total of two hundred fifty thousand dollars (\$250,000) per person and seven hundred fifty thousand dollars (\$750,000) per occurrence. As of August 1, 1997, the per occurrence amount will be increased to one million

dollars (\$1,000,000). The per occurrence cap may be exceeded only if a claimant presents proof of judgment to the Director of the Office of Management and Budget to be included in the proposed budget for the Office of Management and Budget and the Legislature adopts an appropriation to pay the claim during the next regular legislative session.

The Risk Management Fund will not be held liable or indemnify a State employee held liable for punitive or exemplary damages.

Defense Coverage

The Risk Management Fund will defend any claim brought against the State under N.D.C.C. ch. 32-12.2 or brought against a state employee acting within the scope of employment at no cost to the employee, if that employee 1) provides complete disclosure and cooperation in the defense of the claim or demand; 2) has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint or other legal pleading asserting that claim or demand against the State employee; and 3) requests representation.

For any claim brought under N.D.C.C. ch. 32-12.2 a State employee may hire, at his or her expense, counsel to represent the employee in the litigation. If the State employee chooses to hire separate defense counsel, the State will not indemnify, save harmless or defend the State employee nor pay for the State employee's defense or any judgment against the State employee.

The Risk Management Fund may, at its discretion and in consultation with the head of the agency involved and the Attorney General, investigate any occurrence, settle any claim or suit that may result, or submit the claim to mediation or binding arbitration.

Defense costs are payable in addition to the above-stated coverage limit.

Exclusions

Neither the State nor a State employee may be held liable under the State Tort Claims Act for any of the following claims:

- a) A claim based upon an act or omission of a State employee exercising due care in the execution of a valid or invalid statute or rule.
- b) A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the State or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the

discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

- c) A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including a decision to adopt or the refusal to adopt any statute, order, rule, or resolution.
- d) A claim resulting from the decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
- e) A claim resulting from the assessment and collection of taxes.
- f) A claim resulting from snow or ice conditions, water or debris on a highway or on a public sidewalk that does not abut a State-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a State employee.
- g) A claim resulting from any injury caused by a wild animal in its natural State.
- h) A claim resulting from the condition of unimproved real property owned or leased by the State.
- i) A claim resulting from the loss of benefits or compensation due under a program of public assistance.
- j) A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.
- k) A claim resulting from damage to the property of a patient or inmate of a state institution.
- l) A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.
- m) A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.
- n) A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
- o) A claim for damage to property owned by the State.
- p) A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a State employee's operation of a rental vehicle if the vehicle is rented for a period of thirty days or less and the loss is not covered by the State employee's personal insurance or by the vehicle rental company.

Immunity

The Risk Management Fund is a self-retention fund for the State and does not constitute insurance or a government self-insurance pool. Neither the

existence of the Risk Management Fund nor this memorandum of coverage constitutes a waiver of any existing immunity to suit or creates any liability to suit.

Notice Requirement

A person bringing a claim against the State or a State employee for an injury shall present to the Director of the Office of Management and Budget within one hundred eighty (180) days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, names of any State employees known to be involved, and the amount of compensation or other relief demanded. The time for giving notice does not include the time during which a person injured is incapacitated by the injury from giving notice. If the claim is one for death, the notice may be presented by the personal representative, surviving spouse, or next of kin within one year after the alleged injury resulting in the death.

Definitions

Claim: any claim for relief brought against the State or a state employee for an injury caused by the State or a State employee acting within the scope of the employee's employment whether in the state or outside the State.

Injury: personal injury, death, or property damage.

Occurrence: an accident, including continuous or repeated exposure to a condition, which results in an injury.

Personal injury: bodily injury, mental injury, sickness, or disease sustained by a person and injury to a person's rights or reputation.

Property damage: injury to or destruction of tangible or intangible property.

Scope of employment: acting on behalf of the State in the performance of duties or tasks lawfully assigned to the state employee by competent authority and not acting in a manner that constitutes reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct.

State: includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the State.

State employee: all present or former officers or employees of the State or any of its agencies, departments, boards, or commissions, or persons acting on

behalf of such agencies, departments, boards, or commissions in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.

State institution: the state hospital, the developmental center at westwood park, Grafton, the state penitentiary, the Missouri River correctional center, the North Dakota youth correctional center, the school for the blind, the school for the deaf, and similar facilities providing care, custody or treatment for individuals.

Other Coverages

The Risk Management Fund may purchase commercial insurance and/or governmental self-insurance for exposures determined to cause an excessive financial risk to the Fund. Such purchased commercial insurance and/or governmental self-insurance shall be primary coverage.